(2)

Supreme Court, U.S.
FILED
JUL 2 8 2004
OFFICE OF THE CLERK

No. 03-1400

In the Supreme Court of the United States

TRAVIS COUNTY, *ET AL.*,
Appellants,
v.
RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

MOTION TO AFFIRM

GREG ABBOTT
Attorney General of Texas
BARRY R. MCBEE
First Assistant Attorney General
EDWARD D. BURBACH
Deputy Attorney General for Litigation
DON R. WILLETT
Deputy Attorney General for Legal Counsel

R. TED CRUZ
Solicitor General
Counsel of Record
MATTHEW F. STOWE
Deputy Solicitor General
DON CRUSE
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR APPELLEES

QUESTION PRESENTED

Whether a State may use the most recent block-level decennial census data for congressional redistricting, at least until plaintiffs prove a more accurate set of data that is sufficiently geographically precise for congressional redistricting.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iv

Statement of the Case 1

Argument 6

The Questions Presented Are Insubstantial 7

I. There Is No Prohibition on "Mid-Decade" Redistricting 8

A. The Constitution Gives State Legislatures the Primary Responsibility for Redistricting 8

B. Congress Has Not Exercised Any Power to Regulate the Frequency with Which State Legislatures May Redistrict 9

C. Federal Courts Have Repeatedly Recognized the Limited Nature of Court-Drawn Plans and the Primacy of State Legislative Plans in the Constitutional Scheme 10

II. Appellants Failed to Discharge Their Burden of Proving That the New Districts are not Equipopulous 13

III. There Is No Legal Foundation for Appellants' Burden-Shifting Argument 15

IV. Appellants Lack Standing to Bring These Claims 18

Conclusion 18

Appendix A:
Declaration of Ryan Robinson
(Austin/Travis County Trial Exhibit 1) 1a

Appendix B:
Supplemental Declaration of Ryan Robinson and
Census Count Question Resolution (CQR) Data
for Texas (Austin/Travis County Trial Exhibit 2) 4a

Appendix C:
Federal Register Notice (excerpts): Census 2000
Count Question Resolution (CQR) Program 7a

Appendix D:
Balderas v. Texas, No. 6:01-CV-158, slip op.
(E.D.Tex. Nov. 14, 2001) (per curiam),
aff'd mem., 536 U.S. 919 (2002) 14a

TABLE OF AUTHORITIES

Cases **Page**

Abrams v. Johnson, 521 U.S.74 (1997) 11

Branch v. Smith, 538 U.S. 254 (2003) 8

Bush v. Martin,
251 F.Supp. 484 (S.D. Tex. 1966) 12

Bush v. Vera,
517 U.S. 952 (1996) 2

Colleton County Council v. McConnell,
201 F.Supp.2d 618 (D.S.C. 2002) 10

Connor v. Finch, 431 U.S. 407 (1977) 10, 11, 17

Dep't of Commerce v. U.S. House of Representatives,
525 U.S. 316 (1999) 14

Gaffney v. Cummings,
412 U.S. 735 (1973) 14

Growe v. Emison, 507 U.S. 25 (1993) 8, 17

Johnson v. Miller,
922 F.Supp. 1556 (S.D. Ga. 1995) 11

Karcher v. Daggett,
462 U.S. 725 (1983) 13, 14, 16, 17

Larios v. Cox, 300 F.Supp.2d 1320 (N.D. Ga.),
aff'd mem., 124 S.Ct. 2806 (2004) 16, 18

Miller v. Johnson, 515 U.S. 900 (1995) 10

Perry v. Del Rio,
67 S.W.3d 85 (Tex. 2001) 8

Smiley v. Holm, 285 U.S. 355 (1932) 8, 9

State ex rel. Davis v. Hildebrandt,
241 U.S. 565 (1916) 8

United States v. Hays, 515 U.S. 737(1995) 18

Upham v. Seamon,
456 U.S. 37 (1982) (per curiam) 10, 12, 17

Valdespino v. Alamo Heights ISD,
168 F.3d 848 (5th Cir. 1999) 14

Vera v. Bush,
861 F.Supp. 1304 (S.D. Tex. 1994) 2

Vera v. Bush,
933 F.Supp. 1341 (S.D. Tex. 1996) 2, 12

Vera v. Bush,
980 F.Supp. 251 (S.D. Tex. 1997) 2, 13

Wesberry v. Sanders, 376 U.S. 1 (1964) 17, 18

White v. Weiser, 412 U.S. 783 (1973) 8, 12

Wise v. Lipscomb, 437 U.S. 535 (1978) 11, 17

Constitutional Provisions, Statutes, and Rules

U.S. CONST. art. I, §2 18

U.S. CONST. art. I, §4, cl. 1 ..... 8, 9

2 U.S.C. §2c 6, 9

2 U.S.C. §7 9

2 U.S.C. §9 9

SUP. CT. R. 18.6 1

SUP. CT. R. 18.12 18

TEX. CONST. art. III, §1 8

Other Authorities

MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004 2

THE FEDERALIST No. 59 (A. Hamilton) 9

http://www.sos.state.tx.us/elections/historical/ 2

In the
Supreme Court of the United States

TRAVIS COUNTY, *ET AL.*,
Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

---

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 18.6, Appellees the State of Texas, Texas Governor Rick Perry, Texas Lieutenant Governor David Dewhurst, Texas House Speaker Tom Craddick, and Texas Secretary of State Geoffrey S. Connor (collectively, "the State") move to summarily affirm the judgment of the three-judge court on the ground that the arguments presented are so insubstantial as not to warrant further argument. SUP. CT. R. 18.6.

STATEMENT OF THE CASE

Following the 1990 decennial census, in 1991 the Texas Legislature adopted a congressional redistricting plan for the State of Texas. Since Reconstruction, Texas voters had been reliably Democratic, but, in the 1980s and 90s, they began voting more and more Republican. The 1991 plan, whose design has been credited in large part to Appellant Congressman Martin Frost, has been described by neutral observers as the "shrewdest" Democratic

gerrymander of the 1990s. J.S. App., at 54a-55a (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1448).[1]

Over the next twelve years, that plan was judicially modified twice,[2] including in 2001 when two new congressional seats were added after the 2000 census. App. D, at 14a. But, throughout those modifications, the basic contours of the plan remained the same,[3] preserving the districts of incumbent Democratic Members of Congress despite the growing Republican leanings of the Texas electorate.[4]

---

1. Appellants' jurisdictional statement will be cited as "J.S.," and their appendix items will be cited as "J.S. App." The State's appendices are cited as "App."

2. In 1996, three of Texas's then-thirty congressional districts were redrawn as part of the *Bush v. Vera* litigation. *See* 933 F.Supp. 1341 (S.D. Tex. 1996), *remanded from Bush v. Vera*, 517 U.S. 952 (1996), *aff'g, Vera v. Bush*, 861 F.Supp. 1304 (S.D. Tex. 1994) (finding these three districts unconstitutional but staying the effect of its decision pending appeal); *see also Vera v. Bush*, 980 F.Supp. 251 (S.D. Tex. 1997) (leaving the court-drawn districts in place). The second judicial modification was in 2001. App. D, at 14a.

3. In 2001, the federal court plan added two seats while causing the least disruption to the existing plan, App. D, at 19a; *see also id.*, at 20a ("It was plain that . . . no incumbent was paired with another incumbent or significantly harmed by the plan."). As a result, all 28 incumbents who ran for reelection won back their seats.

4. By 2002, Texas voters had elected Republicans to 27 out of 27 statewide elected offices and to majorities in both Houses of the State Legislature. *See* http://www.sos.state.tx.us/elections/historical/; *see also* J.S. App., at 4a. The Republican candidate for governor in 2002 prevailed with 58 percent of the vote, *id.*, and the Republican candidate for governor in 1998 garnered 69 percent of the statewide vote, *id.* Nevertheless, despite these statewide voting trends, in 2002 Democrats still maintained a majority in congressional delegation, which was split 17 to 15. *Id.*

In 2003, for the first time in over a decade, the Texas Legislature passed a congressional redistricting plan, Plan 1374C. That plan undid the preexisting Democratic gerrymander, jeopardized the reelection chances of several incumbent Democratic Congressmen, and created an additional African-American and additional Hispanic opportunity district in Texas. This litigation immediately ensued.

Following extensive discovery, two weeks of trial, and dozens of witnesses, the three-judge federal court affirmed the legality of the plan in all respects. The court carefully weighed the evidence, assessed the credibility of the witnesses, sifted through the facts concerning each contested congressional district, and issued a detailed and thorough 99-page legal opinion affirming the legality of Plan 1374C.

Appellants' Statement of the Case focuses on the reliability of the census data that were used to draw Plan 1374C. There is no factual dispute that Plan 1374C's thirty-two congressional districts are perfectly equipopulous based on the Census Bureau's official block-level data, with a maximum variance of one person per district (because the total number of Texans is not evenly divisible by thirty two).

Appellants place great emphasis on the Count Question Resolution (CQR) Program results that were released in the weeks prior to the enactment of Plan 1374C on October 12, 2003.[5] J.S., at 6 n.7; *see also* App. B, at 6a. However, the CQR data merely

---

5. Appellants omitted the specific documents upon which they relied from their Jurisdictional Statement. Because Appellants must satisfy a high burden of proof in order to prevail on an equal-population claim, *see* Part II, *infra*, the State has attached both of Appellants' trial exhibits, *in toto*, for the Court's convenience. *See* App. A (Declaration of Ryan Robinson) & App. B (Supplemental Declaration & CQR release).

reflected slight population corrections for selected local governmental units that had requested that particular housing clusters be reassigned or borders be corrected. App. B, at 6a (CQR release for Texas); App. C, at 7a, 9a-11a (describing the program).

The Census Bureau expressly qualified the release of CQR data with an official statement that "[t]he CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes . . . ." App. C, at 7a (Federal Register); *accord* App. C, at 12a ("The Census Bureau will not change the . . . redistricting counts to reflect corrections resulting from the CQR process.").

Consequently, any implication from Appellants' Statement of the Case that the CQR data could form the basis of a perfectly equipopulous statewide congressional redistricting plan is mistaken. The Texas CQR data do not cover the entire State, and even for the covered regions, it contains data only at the geographic level of cities and counties. *See* App. B. Appellants did not submit any evidence proving a method to translate data at that level of granularity into perfectly equipopulous congressional districts, nor did they propose a congressional map based on such data.

Moreover, the CQR data do not indicate any change in the population for any of the component cities or counties within Congressional District 10, the district in which the only individual Appellant, Gus Garcia, resides.

Appellants' characterization of the record as to post-census population changes fails to reveal the dearth of evidence they presented concerning the current post-census population. *See* J.S., at 6-7. Appellants introduced a brief declaration from a city demographer to the unremarkable effect that the population of Texas has not been perfectly static since the official census date of April 1, 2000. App. A (Robinson declaration). Appellants'

declaration discusses population changes in terms of statewide growth, general spatial distribution of the population, and broad trends.[6] *See* App. A, at 1a-3a.

Finally, contrary to Appellants' characterization, the record does not demonstrate that legislators took into account any post-census population changes that had already occurred. *Cf.* J.S., at 7 ("those charged with redrawing the lines" "did not" "ignore[] these population changes"). The testimony referenced by Appellants concerned *future* growth trends, not any attempt to benefit from past changes.[7] J.S., at 7-8. And the testimony cited by Appellants does not bear on Congressional District 10, the district in which the one individual Appellant resides.

---

6. Appellants suggest the statewide population had by late 2003 increased by "more than a million persons—enough for still two more congressional seats." J.S., at 6. Because congressional reapportionment of seats awarded Texas only thirty-two seats, J.S. App., at 3a, drawing more than thirty-two districts was not an option.

7. Appellants relied on two snippets of trial testimony to support their claim. The first, about District 4, by its terms discussed future growth patterns. *See* J.S., at 7 (citing trial testimony that a district would "grow into" a different political column). The second, concerning Wise County, discussed whether that county shared common drivers of growth with other counties in the district—*i.e.*, whether those counties shared an economic community of interest—not the county's relative population growth. *See* J.S., at 8 (citing trial transcript). None of this testimony shows legislators looking to a different set of *current* population numbers to generate unequal districts.

ARGUMENT

The judgment below has yielded five separate appeals to this Court.[8] Four of the five jurisdictional statements challenge what they term "mid-decade" redistricting. Although the Texas Legislature had not passed a congressional redistricting plan for twelve years, the appellants repeatedly frame their challenge as one to state legislatures' revisiting redistricting multiple times in a single decade.

In the face of explicit constitutional language and Supreme Court precedent making clear that it is the prerogative and primary responsibility of state legislatures to redistrict, the appellants ask the courts to engraft an additional limitation onto the Constitution.

Each set of appellants has a different theory as to why they believe "mid-decade" redistricting should be judicially prohibited: the *Jackson* Appellants urge a fusion with the Court's political gerrymandering cases; Appellant Henderson relies on federal statute, 2 U.S.C. §2c; Appellants Congresswomen Lee and Johnson rely on the Census Clause of the U.S. Constitution; and the Travis County Appellants in the instant case suggest modifying the "one person-one vote" standards to require updating the census count more often than once a decade.

Although creative, none of these theories is persuasive. Each will be addressed in the relevant Motion to Affirm.[9]

---

8. In addition to this appeal, see also *Jackson v. Perry*, (No. 03-1391); *American GI Forum v. Perry*, (No. 03-1396); *Jackson Lee v. Perry*, (No. 03-1399); *Henderson v. Perry*, (No. 03-9644).

9. Because of these similarities, Part I of this Motion to Affirm necessarily covers the same ground as the respective Part I in the Motions to Affirm filed in those other appeals.

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

On the issue of "mid-decade" redistricting, these appeals present no split of authority whatsoever. Nor do they implicate the broad policy specter repeatedly invoked—that of state legislatures returning seriatim, year after year, to redistrict throughout the decade. The facts of this case do not present the Court with an opportunity to address that question. Rather, this case concerns a factbound application of settled law to the unremarkable circumstances of a legislature adopting a redistricting plan following a judicial remedial plan that expressly invited the Legislature to do so. Given that the Texas Legislature had not adopted a congressional redistricting plan for twelve years prior, the issue of "mid-decade" redistricting simply is not presented.

The three-judge court unanimously rejected all of the challenges to so-called "mid-decade" redistricting. The majority opinion painstakingly refuted the appellants individual arguments, J.S. App., at 5a-26a, and Judge Ward's limited dissent explicitly "join[ed] the court's decision that the Elections Clause does not prohibit mid-decade redistricting." J.S. App., at 124a.

With respect to the specific legal theory raised by Appellants, no court has ever adopted it. Although framed in terms of this Court's "one person-one vote" doctrine, the argument is in reality a back-door attempt to convince the Court to prohibit "mid-decade" redistricting. That argument is contrary to the text of the Constitution and to the Court's clear precedents. There is no cause for the Court to resolve an appeal offering so insubstantial a legal basis.

I. THERE IS NO PROHIBITION ON "MID-DECADE" REDISTRICTING.

A. The Constitution Gives State Legislatures the Primary Responsibility for Redistricting.

Article I, §4 of the United States Constitution, known as the Elections Clause, expressly delegates power over congressional districting to the state legislatures:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, §4, cl. 1 (emphasis added).

This Court has long held that the power delegated to States includes the power to draw congressional districts. *See Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, §4); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916) (same). And, the Court has repeatedly held that, "the Constitution leaves with the States *primary responsibility* for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."); *Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature.").

Moreover, under Texas law, "[t]he Legislature is the department constitutionally responsible for apportioning the State into federal congressional legislative districts." *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001); *see also* TEX. CONST. art. III, §1 ("The Legislative power of this State shall be vested in a Senate and House of

Representatives, which together shall be styled 'The Legislature of the State of Texas.'").

B. Congress Has Not Exercised Any Power to Regulate the Frequency with Which State Legislatures May Redistrict.

The words "Times, Places, and Manner" in the federal Elections Clause are "comprehensive words embrac[ing] authority to provide a complete code for congressional elections," subject to Congress's power also to enact laws over the same subject matter. *Smiley*, 285 U.S., at 366-67. As Alexander Hamilton explained, because it was not feasible to insert an entire election code into the Constitution, "a discretionary power over elections ought to exist somewhere." THE FEDERALIST No. 59 (A. Hamilton). The method "with reason . . . preferred by the convention" was to give power "primarily" in the state legislatures but with "ultimat[e]" oversight by Congress. *Id.*

Congress has on occasion used its power under Article I, §4 to enact "such regulations." *See* U.S. CONST. art. I, §4, cl. 1. For example, Congress has provided a uniform day for congressional elections. *See* 2 U.S.C. §7. Congress has provided that votes for congressional candidates must be by written or printed ballots. *See* 2 U.S.C. §9. And, in regard to congressional districting, Congress has provided that Members of the House must be elected from single-member districts rather than the previously accepted practices of at-large statewide seats or multi-member districts. *See* 2 U.S.C. §2c ("[T]here shall be established by law a number of districts equal to the number of Representatives.").

Thus, there is no dispute that, pursuant to the second part of the Elections Clause ("Congress may at any time by Law make or alter such Regulations"), Congress could have chosen to prohibit mid-decade redistricting. But, critically, Congress has not done so. No federal statute speaks at all to *when or how often* a State can redraw

its congressional districts. And, absent congressional prohibition, state legislatures retain broad authority over the decision to redistrict.

C. Federal Courts Have Repeatedly Recognized the Limited Nature of Court-Drawn Plans and the Primacy of State Legislative Plans in the Constitutional Scheme.

Given this broad grant of constitutional authority, when federal courts are forced to step into redistricting they do so in a limited way that recognizes the "primary jurisdiction" of the state legislatures in this field. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) (per curiam). Federal courts treat it as an "unwelcome obligation [to] perform[]in the legislature's stead," because, in the words of the Court, "a state legislature is the institution that is by far the best situated" to undertake redistricting. *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). A federal court, meanwhile, "lack[s] the political authoritativeness that the legislature can bring to the task." *Id.* at 415. "Federal courts, unlike state legislatures, are not in a position to reconcile competing state policies on the electorate's behalf, nor to engage in political policy-making decisions. . . . [Courts] do not possess the latitude afforded a state legislature to advance political agendas." *Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 628 (D.S.C. 2002); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

Accordingly, federal court-ordered redistricting plans are focused on remedying violations of the Constitution or of the Voting Rights Act. As the three-judge court noted in adopting the 2001 Texas congressional map: "The Congress has by its enactment of voting rights laws constrained the political process and given the courts a role—to the extent of those constraints. We have no

warrant to impose our vision of 'proper' restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act." App. D, at 25a; *see also* App. D, at 14a-15a, 21a-22a, 24a-25a (noting limited nature of the federal court role); *accord Upham*, 456 U.S., at 43 (holding that unless the plan violated the Constitution or the Voting Rights Act, "the District Court was not free . . . to disregard the political program of the Texas State Legislature").

As the Court has noted concerning the Voting Rights Act,

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan *pending later legislative action*." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

These basic principles—that state legislatures have "primary jurisdiction" over redistricting, are the institution appropriate for the political nature of the task, and can best weigh competing state policies that go beyond minimum compliance with the law—lead to an inexorable result: the mere fact of a court-ordered plan does not foreclose a subsequent, legislative congressional redistricting plan, even within the same decade. *See Johnson v. Miller*, 922 F.Supp. 1556, 1569 (S.D. Ga. 1995) ("We do no harm with this plan, which cures the unconstitutionality of the former and can serve in 'caretaker' status until the legislature convenes to change it. *That may occur following the millennium census, or before.*") (emphasis added), *aff'd sub nom Abrams v. Johnson*, 521 U.S.74 (1997).

The presence of a prior court-ordered remedial plan does nothing to alter the Legislature's authority to adopt a subsequent redistricting plan. Indeed, one need look no further than Texas's own history of congressional redistricting to find repeated examples of courts' deferring to the primary responsibility of the State Legislature to draw its own congressional districts, even immediately after a court-ordered remedial plan. *See* J.S. App., at 9a n.14 (collecting cases).[10]

---

10. For example, in *Bush v. Martin*, 251 F.Supp. 484, 561 (S.D. Tex. 1966), the district court upheld a redistricting plan as minimally constitutional and expressly refuted the argument that the Legislature could not later alter it, even before the next decennial census: "That we do not find [the plan] deficient enough to set it aside and install one of our own is a long way from holding that it is free from shortcomings or that such shortcomings may somehow get frozen into the legislative thinking (or our own) as adequate criteria for the future." In *White v. Weiser*, 412 U.S. 783 (1973), the district court had indicated that its remedial plan was without prejudice to consideration and adoption of any new plan by the Legislature before the next census. *Id.*, at 789. And even that limited order was too broad, and stayed by this Court, because it had unnecessarily deviated from the policy choices made by the Texas Legislature. *Id.*, at 795-97. Likewise, in *Upham*, the Court reversed a district court remedial plan as not "closely approximat[ing] the state-proposed plan." 456 U.S., at 42. In determining whether to allow the now-disapproved district-court plan to be used in the imminent elections, the Court expressly noted that it was "only an interim plan *and is subject to replacement by the legislature in 1983.*" *Id.*, at 44 (emphasis added).

In *Vera v. Bush*, 933 F.Supp. 1341 (S.D. Tex. 1996), the court found the legislative plan to be unconstitutional and ordered its own plan as an interim replacement. *Id.*, at 1346, 1353. In response to an argument that the court should allow the 1996 elections to proceed under the old map, the court replied that the Legislature would be free to implement its own map when it met again: "[Texas Lieutenant Governor] Bullock and [House Speaker] Laney contend that the Texas Legislature is ready and willing to redistrict during its 1997 regular session. Of course, in any

Consistent with this long line of cases, nothing in the three-judge court's 2001 *Balderas* decision purported to divest the Texas Legislature of authority to redistrict in the future. Indeed, the Legislature acted promptly, accepting the court's express invitation to undertake this "quintessentially legislative" task and create two new minority-opportunity districts in Texas through Plan 1374C. *See* App. D, at 21a. There is no support for Appellants' argument that the use of a court-ordered plan in the 2002 election cycle somehow precluded Plan 1374C.

II. APPELLANTS FAILED TO DISCHARGE THEIR BURDEN OF PROVING THAT THE NEW DISTRICTS ARE NOT EQUIPOPULOUS.

The Court has held that, where congressional redistricting plans are challenged on an equal-population basis, plaintiffs "must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld." *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). Appellants do not dispute that the State's redistricting map is perfectly equipopulous under the Census Bureau's block-level data released in March 2001.

Appellants instead argue that the State should have used a different set of population data. But Appellants do not offer evidence that any other source of accurate data exists that could be used to draw districts with a smaller population deviation than the State's perfectly equipopulous districts. Nor do Appellants even

---

event, they will have that opportunity . . . ." *Id.*, at 1346; *see also id.* at 1353. And in *Vera v. Bush*, 980 F.Supp. 251 (S.D. Tex. 1997), after the Texas Legislature failed to enact its own plan in 1997, the district court left its own interim plan in place for the 1998 election cycle. *Id.*, at 254. The court, however, explicitly recognized that the Legislature was free to enact its own congressional redistricting plan as a replacement when it next met. *Id.*, at 252-53.

attempt to propose such a map based on either of the two conflicting data sources they propose, the limited-purpose Count Question Resolution (CQR) Program data or various postcensal population estimates.

These evidentiary failures are fatal to any equal-population claim because of the strong and well-founded presumption in favor of using the census enumeration data for redistricting. Even recognizing that decennial census data "measure[] population at only a single instant in time [and] [d]istrict populations are constantly changing, often at different rates in either direction, up or down," *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), the Court has held that States may rely on the decennial data until replacement data are proven up. This is because "the census data provide the only reliable—albeit less than perfect—indication of the districts 'real' relative population levels . . . [, and] because the census count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality." *Karcher*, 462 U.S., at 738; *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999).

Thus, when plaintiffs seek to dislodge the presumptively accurate census data, they must meet a heavy burden. As the Fifth Circuit has held, plaintiffs must demonstrate that their proposed method of calculating populations is "thoroughly documented, ha[s] a high degree of accuracy, and [is] clear, cogent, and convincing." *Valdespino v. Alamo Heights ISD*, 168 F.3d 848, 853-54 (5th Cir. 1999). Appellants presented no such evidence.

Appellants offered the three-judge court below no alternative map or methodology, instead simply asserting that the prior court-drawn Plan 1151C must be used. Appellants' urged remedy—maintaining Plan 1151C—is a telling demonstration of their real objective, not to champion "one person-one vote," but to

prevent *any* redistricting that altered the incumbency protection of Plan 1151C.

Because *both Plan 1151C and 1374C used the identical 2000 census data*, Appellants' defense of the former over the latter cannot be understood as a good-faith critique of the data.

There is thus no evidence that, if Plan 1151C were used in 2004, it would be any more equipopulous than is Plan 1374C. Consequently, there is no basis to reverse the judgment of the three-judge court rejecting Appellants' claims. *See* J.S. App., at 157a.[11]

III. There Is No Legal Foundation for Appellants' Burden-Shifting Argument.

Because Appellants presented inadequate evidence to support their claims, *see* Part II, *supra*, they now argue that this Court should relieve them of their burden of proof, J.S., at 15. This directly contradicts the holding in *Karcher*, which placed the burden firmly on the party challenging the equipopulosity of a plan.

---

11. Nor is there any reason to believe that Plan 1151C could have met the standard urged by Appellants, even immediately after it was drawn. Elections were not held under Plan 1151C until November 2002. Yet, Appellants presented evidence that by July 1, 2002—months before—the population of Texas had already changed dramatically. *See* App. A, at 1a.

Karcher, 462 U.S., at 730-31.[12] And Appellants cite no legal authority to the contrary.

Appellants argument would also require the Court to disregard established precedent. For example, in *Georgia v. Ashcroft*, the Supreme Court *expressly approved* the legality of using decennial census data throughout the decade:

> "When the decennial census numbers are released, States must redistrict to account for any changes or shifts in

12. This case does not resemble the situation presented in *Larios*, which dealt with population disparities in *state* legislative districts in Georgia. *Larios v. Cox*, 300 F.Supp.2d 1320, 1327 (N.D. Ga.), *aff'd mem.*, 124 S.Ct. 2806 (2004). Not being governed by *Karcher*'s requirement of absolute equipopulosity for congressional districts, those state-level districts had population variances of up to 10 percent. And, as the *Larios* district court found, those variances—apparent on the face of the census data being used—were deliberate and "systematic[]," underpopulating the favored party and overpopulating the disfavored party. *Id.* at 1329.

No such evidence is present in this case. The State's plan complies perfectly with the requirement of population equality. Under the controlling census numbers, the maximum deviation between districts is one person. And Appellants have presented no evidence of any efforts intentionally to distort equipopulosity, to further partisan ends or otherwise.

Indeed, it is Appellants' rule that, if adopted, would "dilute" the standard of "one person-one vote," *cf. Cox v. Larios*, 124 S.Ct., at 2808 (Stevens, J., concurring), by replacing the presumption in favor of objective census enumeration data with the requirement of using subjective and varying estimates of population change.

> population. But *before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned.*" 123 S.Ct. 2498, 2515 n.2 (2003) (emphasis added).[13]

Appellants' rule would also, in practice, disrupt the relative role of state legislatures and federal courts in redistricting. Appellants suggest that burden shifting "would not constitute an absolute legal bar" on a legislature drawing districts after a court-ordered plan has been used. J.S., at 15. That suggestion is disingenuous. *Wesberry v. Sanders* requires almost perfect equality between congressional districts. 376 U.S. 1, 7-8 (1964). In practice, that high degree of mathematical precision would be almost impossible using any data other than the decennial block-level data. Appellants' rule would thus turn on its head the clear guidance that state legislatures have been delegated primary jurisdiction over redistricting as a constitutional matter. *See Growe*, 507 U.S., at 34; *Upham*, 456 U.S., at 41-42; *Connor*, 431 U.S., at 414-15; *see also Wise*, 437 U.S., at 540 ("[I]t becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a reapportionment plan *pending later legislative action*." (emphasis added)).

Appellants presented no data superior to the legally-binding 2000 census data. They presented nothing whatsoever at the block level—the level required to draw districts satisfying equipopulosity. Nor did they present or advert to any methodology for discerning any such block-level data other than using census data. Accordingly, they failed to carry their burden of proof, *see Karcher*, 462 U.S., at 730-31, and the three-judge court properly rejected their claim.

---

13. Indeed, in that 2003 decision, the Court used thirteen-year-old census data from 1990 to evaluate a Voting Rights Act challenge, specifically rejecting the dissent's argument that such data were "irrelevant." *Id.*

IV. Appellants Lack Standing to Bring These Claims.

Appellants also lack standing to bring their equal-population claim. Two of Appellants are governmental entities—The City of Austin and Travis County—neither of which is within the textual protection of Article I. *See* U.S. CONST. art. I, §2 ("by the People of the several States"); *Wesberry*, 376 U.S., at 8.

The third Appellant, Gus Garcia, has shown no cognizable injury. He resides in Congressional District 10, but there is no evidence that his congressional district suffers from any population inequality. The CQR data indicate no corrections for counties within Congressional District 10. *See* App. B, at 6a (CQR data by county and city). And with regard to postcensal estimates, there was no evidence introduced about the *relative* growth or lack of growth in his congressional district as compared with the State as a whole. *Cf.* App. A. (Robinson declaration) (not discussing congressional-district geographies). Appellant Garcia cannot assert an equal-population claim unless he is in an under-represented district. *United States v. Hays*, 515 U.S. 737, 746-47 (1995) (racial gerrymandering); *Larios*, 306 F.Supp.2d, at 1209 (applying *Hays* to the equal-population rule).

CONCLUSION

The Court should summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney
General for Litigation

DON R. WILLETT
Deputy Attorney General
for Legal Counsel

R. TED CRUZ
Solicitor General
Counsel of Record

MATTHEW F. STOWE
Deputy Solicitor General

DON CRUSE
Assistant Solicitor Gene[illegible]

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

July 2004

COUNSEL FOR APPELLEES

APPENDICES

Appendix A

Declaration of Ryan Robinson: Post-Census 2000 Demographic Change in Texas

The redrawn congressional districts of Plan 1374C by HB3 for the state of Texas are based on Census 2000 block-level population data; data that are now old and specious because of rapid and spatially uneven population surges and declines across the state, and additionally, due to changes in the sizes of ethnic groups—for the state as a whole and for communities within the state. It has been almost four years since the federal government conducted its decennial census, and in terms of demographics, a lot has changed in Texas since data sufficient to draw new districts were first made available on March 12, 2001.

Since April 1, 2000—the official Census day that all decennial census data are tethered to—the state of Texas has experienced enough population growth (almost a 1.0 million net gain as of July 1, 2002, according to the Census Bureau) to warrant the addition of two new congressional seats (based on an analysis by Election Data Services, a Washington consulting firm; please see link for Reapportionment Study at the company's web page electiondataservices.com/home.htm). And here is where HB3 begins to foul out, demographically speaking. Now, in late 2003, the state's population growth since Census 2000 has easily exceeded 1.0 million persons because more than 16 months worth of additional growth has occurred since the Bureau's estimate of July 1, 2002. The redistricted HB3 map is abased on old data that reflect a snapshot, a point along the state's growth trajectory that has long since passed.

Population growth comes from two basic sources, migration (the net difference between households moving into the state and households moving out) and natural increase, or the difference between births and deaths. Currently, the state of Texas is experiencing rapid population growth from in-migration and from

natural increase. According to the Census Bureau's 2002 population estimates program (please see Census.Gov.Popest.htm), Texas gets about half of its growth from in-migration and about half from natural increase. As the state continues to gain younger households in their prime child-bearing years and Hispanic families with their higher than average birth rates, Texas is poised to continue to grow enormously, even with attenuated in-migration levels.

Texas is receiving a substantial share of the nation's international immigration stream. Although the magnitude of this migration stream has diminished somewhat after the events of 9/11 and this nation's efforts to more effectively seal its borders, international immigration still contributes a substantial share to the state's overall population growth. This immigration stream is largely non-European, with major components from Asia and Latin America, and shows no sign of stopping anytime soon. Professor Stephan Klineberg at Rice University has outlined the structure of this immigration wave in recent words offered at: report.rice.edu.

The state's Hispanic share of total population is rising rapidly—increasing at an even faster rate during the past four years than it did during the 1990's. And herein lies another point of demographic perversion on the part of HB3—districts have been drawn under Plan 01374C using data that do not fully reflect the current size and spatial scope of the state's largest and most rapidly expanding minority community: Hispanics.

Because US congressional districts must be equal with each other in terms of total population size, the fact that the state has grown markedly and spatially unevenly since April 1, 2000 means that the creators of the HB3 map would have to use current population information to achieve balanced districts. Because old data were used, the resultant districts are not balanced with each other in terms of population.

The enormous population growth that Texas has witnessed over the last three and a half years has not been homogenously spread across

the state. Intra-state migration levels between cities and local household formation rates vary dramatically. Census Bureau estimates data reveal a highly uneven pattern of growth and localized decline. For example, looking at the Census Bureau's mid-year 2002 population estimates shows that the high-flyers of the past decade, places like Dallas and Austin, have seen a slow down in their growth rates, while urban areas like San Antonio (2.0% annualized) and El Paso (1.8% annualized) have taken over as the state's growth leaders (Census.Gov.Popest.htm).

The point here is that population growth is a spatially lumpy phenomenon, and using Census 2000 data to create congressional districts ensures that the districts will not be balanced with one another in terms of total population.

^----------

I declare under penalty of perjury that the foregoing statements are true and correct.

Signed this day, November 14, 2003.

Ryan Folmar Robinson
City Demographer, City of Austin

Appendix B

Supplemental report of Ryan Robinson

Subsequent to Census 2000, the Census Bureau created a program by which local jurisdictions could appeal or challenge their official population and housing counts as produced in the decennial enumeration effort. This appeals process is known as the Count Question Resolution (CAR) program. Information regarding the program may be obtained at the following web page:

http://www.census.gov/dmd/www/CQR.htm

The program began on June 30, 2001 and ended on September 30, 2003. In Texas, a total of 11 jurisdictions sought and received corrected population totals. The revised population total for the state of Texas decreased by 30 persons. The original Census 2000 population figure for the state is 20,851,820. The revised population figure for the state, based on the CQR program is 20,851,790. A listing of the participating jurisdictions is attached—not all population and housing changes are reflected in the table, only changes for participating jurisdictions are shown.

Under the CQR program, local jurisdictions (counties and cities) could appeal their census figures based on three types of possible corrections.

1. Boundary corrections
2. Geocoding corrections, and
3. Coverage corrections

Boundary corrections—Census 2000 respects the proper alignment of the jurisdictional boundaries of functioning governmental units as legally in effect on January 1, 2000. Jurisdictions could use the CQR program to correct boundary errors and gain or lose population accordingly.

Geocoding corrections—concern the placement of living quarters and persons residing therein that were identified during the Census 2000 process but were geographically misplaced. For example, if a jurisdiction can show that an apartment complex falls within a certain census block different from the block that the complex was counted in by the official enumeration, then that change is made at the block-level, while the jurisdiction's total population would not change.

Coverage corrections—deal with housing units and group quarters populations that were either missed entirely or erroneously included by the Census 2000 process. For example, a nursing home and its inhabitants that may have been omitted in the Census 2000 process could be added through the CQR program.

Appendix C

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 001215359-0359-01]

RIN Number 0607-XX62

The Census 2000 Count Question Resolution Program

AGENCY: Bureau of the Census.

ACTION: Notice of Program.

SUMMARY: On January 22, 2001, the Bureau of the Census (Census Bureau) published in the **Federal Register** an initial notice relating to the Census 2000 Count Question Resolution (CQR) program (66 FR 6574). This notice provides information concerning the CQR program as well. The CQR program will address corrections for three types of challenges: (1) boundary corrections, (2) geocoding (geographic assignment) corrections, and (3) data processing corrections. (See the heading ``Types of Corrections that will be Considered for the Census 2000 CQR Program" in the **SUPPLEMENTARY INFORMATION** section.) The CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes; nor is it a mechanism or process to challenge or revise the numbers sent to the President on December 28, 2000, to be used to apportion the U.S. House of Representatives.

Corrected Census 2000 Total Population, Group Quarters Population, Total Housing Unit, and Vacant Housing Unit Counts for Governmental Units

Note: Corrected counts are a result of the Count Question Resolution (CQR) Program.

Federal Register/Vol. 66, No. 130/Friday, July 6, 2001 (Summary): *The CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes; nor is it a mechanism or process to challenge or revise the numbers sent to the President on December 28, 2000, to be used to apportion the U.S. House of Representatives.*

The state level census counts will always be presented, regardless of whether or not there is a CQR change to the counts at the state level.
Below the state level, the tables will present census counts only for those governmental units in which a CQR change has occurred, with one exception. When a CQR chang occurs in a place that is in more than one county, the table will display census counts for all the county parts, regardless of whether or not each part had a CQR change.

Last updated 8/29/2003

Number of governmental units affected by CQR = 11

State County Place	State FIPS	County FIPS	Place FIPS	2000 Census Counts Tabulation (Original) Total Population	Group Quarters Population	Total Housing Units	Vacant Housing Units	Corrected (Revised) Total Population	Group Quarters Population	Total Housing Units	Vacant Housing Units
Texas	48			20 851 820	581 109	8 157 575	764 221	20 851 790	581 109	8 157 557	764 221
COUNTY											
Collin County	48	085		491 675	3 332	194 892	12 922	491 774	3 332	194 946	12 922
Dallas County	48	113		2 218 899	33 470	854 119	48 498	2 218 774	33 470	854 048	48 498
Taylor County	48	441		126 555	8 354	52 056	4 782	126 551	8 354	52 058	4 782
PLACE											
Abilene city	48	000	01000	115 930	10 932	45 618	4 048	115 926	10 932	45 617	4 048
Jones County (part)	48	253	01000	5 488	4 650	452	82	5 488	4 650	452	82
Taylor County (part)	48	441	01000	110 442	6 282	45 166	3 966	110 438	6 282	45 165	3 966
Aurora town, Wise County	48	497	04672	853	-	332	20	875	-	339	21
Bridgeport city, Wise County	48	497	10264	4 309	352	1 515	132	4 827	870	1 515	132
Hallettsville city, Lavaca County	48	285	31888	2 345	12	1 223	204	2 663	230	1 223	204
Jasper city, Jasper County	48	241	37420	8 247	784	3 467	579	7 657	204	3 467	579
Richardson city	48	000	61796	91 802	809	36 530	1 339	91 776	808	36 513	1 339
Collin County (part)	48	085	61796	20 873	1	8 820	599	20 972	1	8 874	599
Dallas County (part)	48	113	61796	70 929	808	27 710	740	70 804	808	27 639	740
Sachse city	48	000	64084	9 751	-	3 350	120	9 884	-	3 393	127
Collin County (part)	48	085	64084	1 660	-	592	23	1 793	-	635	24
Dallas County (part)	48	113	64084	8 091	-	2 758	103	8 091	-	2 758	103
Venus town	48	000	75236	910	-	344	12	1 892	982	344	12
Ellis County (part)	48	139	75236	-	-	-	-	-	-	-	-
Johnson County (part)	48	251	75236	910	-	344	12	1 892	982	344	12

- represents zero

* * * * * *

Corrections made to the population and housing unit counts by this program will result in the issuance of new official Census 2000 counts to the officials of governmental entities affected by these corrections and may be used by the governmental entities for future programs requiring official Census 2000 data. These corrections also will be:

- used specifically to modify the decennial census file for use in yearly postcensal estimates beginning in December 2002, and
- included in the errata information to be made available via the Internet on the American FactFinder System.

We will NOT incorporate the CQR corrections into Census 2000 data products.

* * * * * *

EFFECTIVE DATE: This program will become effective on June 30, 2001, and will end on September 30, 2003.

FOR FURTHER INFORMATION: Robert A. Rinaldi, Assistant Division Chief, Decennial Management Division, Count Question Resolution, U.S. Census Bureau, Room 2002/2, 4700 Silver Hill Road, Stop 7100, Washington, DC 20233-7100. Telephone: 1-866-546-0527 (toll free); Fax: 301-763-0260; or E-mail: Count.Question.Resolution@census.gov

SUPPLEMENTARY INFORMATION:

Background Information

* * * * * *

Data collection for Census 2000 ended in the Local Census Offices on or before August 30, 2000. This schedule allowed the

Census Bureau time to produce the state level apportionment counts by December 31, 2000, as required by law.

* * * * * *

Executive Orders

This notice has been determined to be not significant for purposes of Executive Order (E.O.) 12866. This program does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 13132.

* * * * * *

Types of Corrections that will be Considered for the Census 2000 CQR Program

Corrections for three types of challenges will be considered as a result of the Census 2000 CQR program. (For acceptable documentation to initiate such challenges, refer to the section ``Criteria for Acceptable Documentation Necessary to Initiate the Census 2000 CQR Process.")

(1) *Boundary corrections*—Census 2000 respects the proper alignment of the boundaries of actively functioning governmental units and legal administrative areas within governments as legally in effect on January 1, 2000. Census 2000 also uses the boundaries of statistical entities that serve as the surrogates for a legal entity for selected entities as submitted and verified in statistical areas programs. The Census Bureau needs to ensure that the geographic assignment information provided does not, in fact, reflect legal boundary changes made after January 1, 2000 or statistical boundary changes after verification. Problems, such as the inaccurate reporting of legal or statistical area boundaries and the inaccurate recording of such boundaries by the Census Bureau, will be addressed by the CQR program. The boundaries of other geographic areas, such as most census designated places, census

tracts, voting districts, school districts, and similar areas are not in the scope of the Census 2000 CQR program. See question ``3" in the section entitled ``Exhibit--Additional Information" for specific information concerning the geographic entities for which challenges will be processed.

(2) *Geocoding corrections*—These corrections affect the placement of living quarters and associated population within the correct boundaries or census block. Even if the CQR process does not result in a change to the total count for a state, local, or tribal jurisdiction, we will send a letter to the state, local, or tribal government official with a CQR submission when the Census Bureau moves group quarters or housing units to different blocks within the jurisdiction.

(3) *Data Processing corrections*—This category includes data on specific living quarters and persons residing therein that were identified and collected during the Census 2000 process but erroneously included or excluded due to processing errors.

Corrected CQR counts issued will be based on the housing unit and population counts as of April 1, 2000, and may be used by governmental entities for all programs requiring official Census 2000 data. The CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes; nor is it a mechanism or process to challenge or revise the numbers sent to the President on December 28, 2000, to be used to apportion the U.S. House of Representatives. The Census Bureau will not make corrections to the data concerning the characteristics of the population and housing inventory. The corrected counts will be reflected in the Census Bureau's decennial file modified for use in making postcensal estimates that will be released on a flow basis beginning in December 2002. An inventory of corrections also will be available on the American FactFinder

Internet Data Access System (errata) and updated periodically. Base files for the Census 2000 will remain unrevised so that none of the standard Census 2000 data products will reflect the corrections.

* * * * * *

Definitions of Key Terms

* * * * * *

Block (census block)—A geographic area bounded on all sides by visible features such as streets, roads, streams, and railroad tracks, and occasionally by non-visible boundaries such as city, town, or county limits. Blocks do not cross census tract or block numbering area boundaries. A block is the smallest geographic entity for which the Census Bureau tabulates decennial census information.

Census Tract—A small, relatively permanent statistical subdivision of a county in a metropolitan area or a selected non-metropolitan county, delineated by a local committee of census data users for the purpose of tabulating and presenting decennial census data. Census tract boundaries normally follow visible features, but may follow governmental unit boundaries and other non-visible features. Census tracts generally contain between 1,000 and 8,000 people, and average about 1,700 housing units and 4,000 people.

* * * * * *

Postcensal Estimates—Population estimates for the years following the last published decennial census. Existing data series, such as births, deaths, federal tax returns, medicare enrollment, and immigration and housing unit information are used to update the decennial census counts during the estimating process. These estimates are used in federal funding allocations, monitoring recent demographic trends, and benchmarking many federally funded survey totals.

Public Law 94-171—The federal law amending Section 141 of Title 13 directing the Secretary of Commerce (who delegates that responsibility to the Director of the Census Bureau) to provide selected decennial census data tabulations to the states by April 1 of the year following the census. These tabulations are used by the states to redefine the areas included in each congressional district and the areas used for state and local elections, a process called redistricting.

* * * * * *

Summary File 1—A data file that presents counts and basic cross- tabulations of information collected [[Page 35593]] from all people and housing units. This information includes age, sex, race, Hispanic or Latino origin, household relationship, and whether the residence is owned or rented. Data will be available down to the block level for many tabulations, but limited to the census tract level in cases where there are concerns with disclosure. Summaries also will be included for most other geographic areas, such as places, county subdivisions, ZIP Code tabulation areas and 106th congressional districts.

Exhibit--Additional Information

* * * * * *

Will the Census Bureau incorporate corrections from the CQR process into the apportionment or redistricting data or subsequent data products?

The Census Bureau will not change the apportionment or redistricting counts to reflect corrections resulting from the CQR process. In accordance with the law, apportionment counts were delivered to the President on December 28, 2000, and the counts required for redistricting were delivered to the states by April 1, 2001.

CQR corrections also will not be incorporated in subsequent data products for Census 2000. This will allow the Census Bureau to maintain consistency between data products while maintaining the schedule for timely release of the data. However, the Census Bureau will issue a revised official Census 2000 population and housing unit counts for the affected governmental entity(es), maintain a list of CQR corrected areas on the American Factfinder, and will incorporate any corrections into its Postcensal Estimates program beginning in December 2002.

Dated: June 18, 2001.

William G. Barron, Jr.,

Acting Director, Bureau of the Census.

[FR Doc. 01-16868 Filed 7-5-01; 8:45 am]

BILLING CODE 3510-07-P

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

SIMON BALDERAS, ET AL	§	
	§	CIVIL ACTION
vs.	§	NO. 6:01CV158
	§	
STATE OF TEXAS, ET AL.	§	

This Filing Applies to: All Actions

Before HIGGINBOTHAM, Circuit Judge, HANNAH and WARD, District Judges.

PER CURIAM:

This phase of the redistricting case involves the Texas congressional districts following the 2000 census. After a period of deferral to the State of Texas as mandated in *Growe v. Emison*[1] and the failure of the State to produce a congressional redistricting plan, we are left with the "unwelcome obligation of performing in the legislature's stead."[2] We will describe the course of this litigation

1. 507 U.S. 25 (1993).
2. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

and explain the process by which we drew the congressional redistricting plan which we order.[3]

I

Voters and various officeholders filed multiple lawsuits in state and federal court challenging the districting of Texas' congressional seats and both houses of the state legislature based on the 2000 census.[4] The federal cases were consolidated into the earliest-filed federal action, *Balderas v. Texas*, No. 6:01-CV-158, before this three-judge court.[5] Pursuant to the Supreme Court's direction in *Growe*, on July 23, 2001 we deferred proceedings in federal court until October 1, 2001. We directed that the trial of any challenge to any state-adopted plan for congressional districts, or of any dispute over an appropriate plan to be adopted if the State adopted no plan, would begin on October 15, 2001. Any trials of the disputes over the districts for the state Senate and House would follow in that order. The record in each trial would rest on the trials which preceded it as well as its own. We prescribed the usual pre-trial tasks. All this was to reduce, if not avoid, any delay in the

---

3. The Congressional Districts imposed by this court's Final Judgment shall bear the number 1151C, which is the next number available for public plans within the Texas Legislative Council's RedAppl 2001 computer program.

4. *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex.); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex.); *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County, Tex.); *Cotera v. Perry*, No. GN-101660 (353rd Dist. Ct., Travis County, Tex.); *Connolly v. Perry*, No. GN-102250 (98th Dist. Ct., Travis County, Tex.); *Associated Republicans of Texas v. Cuellar*, No. 2001-26894 (281st. Dist. Ct., Harris County, Tex.); *Rivas v. Cuellar*, No. 2001-33760 (152nd Dist. Ct., Harris County, Tex.).

5. Other three-judge courts had dismissed prior suits filed prematurely.

electoral process and to follow the specific command of the Supreme Court in *Growe*.

On September 12, 2001, the Texas Supreme Court determined that the Travis County trial court had dominant jurisdiction among the state cases to hear the various plaintiffs' redistricting claims and held that a state trial court in Travis County must decide the districting dispute. The Travis County court commenced trial on September 17, 2001. It heard testimony and arguments from all the parties, concluding trial on September 28, 2001.

On October 1, 2001, at the request of the state trial judge, we extended the deadline for the filing of any congressional redistricting plan to October 3, 2001. On October 3, the state trial court issued a plan, known as 1065C. No provision was made in our October 1 order for the filing of any new plan, although the state trial judge advised that he might modify the plan on or before October 10, 2001. The schedule we had provided did not contemplate major changes in the state court plan filed on October 3. On October 10, 2001, the state court nonetheless issued a new plan, known as 1089C. We immediately delayed the start of any federal trial for one week to October 22 at the request of the parties who pointed to the need for additional time given the substantial differences between the two plans of the state court. On October 19, 2001, however, the Texas Supreme Court vacated the trial court's October 10, 2001 judgment based on a violation of the parties' state constitutional rights and remanded the case to the state trial court.[6] The Texas Supreme Court also concluded that 1065C, the first plan of the state trial court, was not the baseline plan for this court to use, because 1065C was never adopted as a final judgment by the state trial court. The Texas Supreme Court acknowledged that the end result of the state processes left the

---

6. *Perry v. Del Rio*, No. 01-0988, 2001 WL 1285081, at *9 (Tex. Oct. 19, 2001).

federal courts with no choice but to proceed without the benefit of a state plan.[7]

As forecasted by the Texas Supreme Court, we proceeded to trial in Austin, Texas on October 22, 2001, without a state baseline plan in place. This court heard testimony and took evidence on congressional redistricting plans between October 22 and November 1, concluding with final argument on November 2. The parties filed post-trial briefs on November 7, 2001. After reviewing the evidence and the parties' submissions, we now turn to our decision implementing a plan for the redistricting of the Texas congressional districts based on the 2000 census.

II

Federal courts have a limited role in crafting a congressional redistricting plan where the State has failed to implement a plan. The limits are not to be found in the traces of the unconstitutional plan being replaced. "Although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans."[8] Rather, the court must draw a redistricting plan according to "neutral districting factors," including, *inter alia*, compactness, contiguity, and respecting county and municipal boundaries.[9] The 1991 plan as modified in 1996 is conceded by all parties to be unconstitutional, made so by changes in population disclosed by the decennial census, if not also for other reasons. In our effort to steer the required neutral course through this political sea, we have been assisted by the many distinguished political scientists who have testified in this case.

---

7. *Id.*

8. *Upham v. Seaman*, 456 U.S. 37, 39 (1982) (per curiam).

9. *See Abrams v. Johnson*, 521 U.S. 74, 88, 98 (1997); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Dr. John Alford, Rice University professor of political science, detailed in his trial testimony a process drawing upon principles of district line-drawing that stand politically neutral. We found that process, substantially parallel to our preliminary thinking and that of other courts, to be the most appropriate for our judicial task.

Our decisional process accepted the reality that, as with so many decisional processes, the sequence of decisions is critical. Starting with a blank map of Texas, we first drew in the existing Voting-Rights-Act-protected majority-minority districts. We were persuaded that the next step had to be to locate Districts 31 and 32, the two new Congressional seats allotted to Texas following the 2000 census. As observed by Dr. Alford, the most natural and neutral locator is to place them where the population growth that produced the new additional districts has occurred.[10] It is self-evident that this locator is, across cases, neutral down to the immediate area, if not in the ultimate, precise fit on the ground. Here the new districts' precise landing was virtually dictated by step 1. When we sent the two new districts to the areas of greatest population growth, Dallas County and Harris County, the districts necessarily landed in the northern half of these counties, and, in the case of District 31, continuing over to Williamson County. Their landing was directed by the location of the protected majority-minority districts in southern Dallas and Harris Counties, which could not be disrupted. Use of this neutral guide was further supported by the circumstance that the Texas legislature has

---

10. We are not the first court to see the wisdom of this choice. *See, e.g., Johnson v. Miller*, 922 F.Supp. 1556, 1563 (S.D. Ga. 1995) (discussing the decision to place Georgia's additional congressional district in high population growth area near Atlanta), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997).

previously located new districts in the areas of greatest population growth.[11]

With a large part of the Texas map thus drawn, we looked to general historic locations of districts in the state, such as the districts in the Panhandle and the northeast corner of the state, the north central districts of the Red River area,[12] through the metropolitan districts and the central plains. We then drew in the remaining districts throughout the state, emphasizing compactness, while observing the contiguity requirement.[13] We struggled to follow local political boundaries that historically have defined communities--county and city lines.[14] In the vernacular, "splits" of counties and cities in our drawing had to be a product of our neutral standards and the demands of population equality. We eschewed an effort to treat old lines as an independent locator, an effort that,

---

11. *See Bush v. Vera*, 517 U.S. 952, 1003 (1996) (Stevens, J., dissenting) ("Because Texas' growth was concentrated in south Texas and the cities of Dallas and Houston, the state legislature concluded that the new congressional districts should be carved out of existing districts in those areas.").

12. *Cf. Johnson*, 922 F.Supp. at 1565 (discussing Georgia's tradition of having four "corner districts" in its congressional plans).

13. *See Good v. Austin*, 800 F.Supp. 557, 563 (E.D. Mich. & W.D. Mich. 1992) ("In addition to serving as a check on gerrymandering compactness 'facilitates political organization, electoral campaigning, and constituent representation.'" (quoting *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring))).

14. *See Karcher*, 462 U.S., at 758 (Stevens, J., concurring) ("Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services. In addition, legislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters." (footnote omitted)).

in any event, would be frustrated by the population changes in the last decade. Nonetheless, the districts fell to their long-held areas, a natural result of the process we have described, much the same as the map drawn at our request by the State using Dr. Alford's neutral approach.

As we have explained, in our efforts to avoid splitting counties and cities, and in particular "double splits," or simultaneously moving populations in and out of a county between two districts, we also strove for compactness and contiguity. Doing so did much to end most of the below-the-surface "ripples" of the 1991 plan and the myriad of submissions before us. For example, the patently irrational shapes of Districts 5 and 6 under the 1991 plan, widely-cited as the most extreme but successful gerrymandering in the country, are no more.

As a check against the outcome of our neutral principles, we asked if the resulting plan was avoidably detrimental to Members of Congress of either party holding unique, major leadership posts. We looked at three Democrats and three Republicans, consensus members of this limited group, each with substantial leadership positions in the Congress. It was plain that these Members were not harmed in their reelection prospects by this plan and that, indeed, no incumbent was paired with another incumbent or significantly harmed by the plan. We thus considered no change in our map in response to this inquiry. Doubtlessly some may see any such weighting as an incumbency factor since congressional leadership so directly correlates with seniority. This view is not without force. Nonetheless, three circumstances must also be considered. First, this correlation is no longer so complete. Second, it does not here offer purchase to one political party over another. And, finally, it reflects a traditional state interest in the power of its congressional delegation distinct from partisan affiliation.

Finally, we checked our plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races. This is a traditional last check upon the rationality of any congressional redistricting plan,[15] widely relied-upon by political scientists to test plans, if only in a approximating manner. We found that the plan is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state. It must be understood that any plan necessarily begins with a Democratic bias due to the preservation of protected majority-minority districts, all of which contain a high percentage of Democratic voters.

III

Various parties urged us to create both African-American and Latino minority districts. These districts are not required by law, as discussed in more detail below, but could be created by the State so long as race was not a predominant reason for doing so. Whether to do so is, however, a quintessentially legislative decision, implicating important policy concerns.[16] We did not avoid creating such a district. At the same time, we did not depart from our neutral factors to draw any district not required by law. To do so would render our effort to keep our thumb off the political scale an illusion.[17]

---

15. *See, e.g., Good*, 800 F.Supp. at 566-67 (using partisan fairness to assess plan drawn according to neutral principles).

16. *See Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. Unit A Feb. 1981).

17. *Cf. Abrams*, 521 U.S., at 88.

IV

Finally, to state directly what is implicit in all that we have said: political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map.[18] Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should. We do so because our role is limited and not because we see gerrymandering as other than what it is: an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.

V

The parties presented competing plans for redistricting the Congressional seats. We have passed by the approach by which these plans were created in favor of the approach we have described, which we found to be mandated by our position as a federal court engaging in our "delicate task with limited legislative guidance."[19]

Several parties raise Voting Rights Act arguments in support of their preferred plans. In drawing our plan, we have endeavored to

---

18. *See Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see generally Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality opinion of White, J.); *cf. Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.").

19. *Abrams*, 521 U.S., at 101.

ensure that the plan complies with the goals of sections 2[20] and 5[21] of the Voting Rights Act.[22]

Our plan works no retrogression. We have maintained intact the existing districts, and, to the extent the boundaries have changed, as we "zeroed out" the plan, the minority populations have been either enhanced or not diminished in any meaningful way (*i.e.*, by mere fractions of percentages). Thus, although the minority populations in Districts 15, 16, and 30 represent a slightly smaller, but still overwhelming, percentage of the total populations of those districts as compared with the baseline 1991 plan as modified in 1996, we find that these changes do not result in "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[23]

The Balderas plaintiffs argue that the congressional plan must contain seven Latino registration majority districts, within nine Latino voting age majority districts, to avoid a section 2 violation. The Martinez intervenors specifically argue for a Latino opportunity district in Dallas County to maintain compliance with section 2. Many parties, including the Texas Coalition of Black Democrats, argue for an African-American opportunity district, generally labeled District 25, in Fort Bend and Harris Counties.

The Latino and African-American plaintiffs thus present competing positions, reflecting a political reality that they are competitors in the political process.[24] This competition finds

---

20. 42 U.S.C. § 1973.

21. 42 U.S.C. § 1973c.

22. *See Abrams*, 521 U.S., at 90, 96.

23. *Beer v. United States*, 425 U.S. 130, 141 (1976); *see also Abrams*, 521 U.S., at 95; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997).

24. Several political scientists alluded to this political reality in their testimony.

expression in an absence of cohesive voting between Latinos and African-Americans at the point in which it is meaningfully measured, the Democratic primaries.

We find that the plaintiffs have failed to prove that vote dilution will occur in violation of section 2 of the Voting Rights Act in the absence of seven Latino citizenship majority congressional districts or an African-American opportunity district, proposed District 25, in Fort Bend and Harris Counties. The evidence did not persuade us that either Latino or African-American voting age populations are sufficiently numerous to form voting age population majorities in effective districts.[25] The plaintiffs have also not proved that Latinos and African-Americans vote cohesively as required by *Thornburg v. Gingles*[26] so as to constitute a majority in a single-member district.[27]

Looking first to the proposed African-American opportunity district, the Texas Coalition of Black Democrats has conceded that the evidence showed that African-Americans would not be an absolute majority of citizen voting age population in the proposed District 25. Again, the plaintiffs were unable to prove cohesive voting between Latinos and African-Americans sufficient to compel the drawing of a district in Fort Bend and Harris Counties.[28] The overwhelming evidence found to be persuasive was to the contrary.

The matter of creating such a permissive district is one for the legislature.[29] As we have explained, such an effort would require

---

25. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999).

26. 478 U.S. 30, 50-51 (1986).

27. *See Valdespino*, 168 F.3d at 852-53.

28. *See Growe*, 507 U.S., at 41.

29. *See Johnson*, 922 F.Supp. at 1567 ("Since political considerations pervade the redistricting task, the Court feels that any permanent footprint left on Georgia's political landscape . . . should be

that we abandon our quest for neutrality in favor of a raw political choice. We offer no opinion as to the wisdom of an appropriate body doing so. Such arranging of voting presents a large and complex decision with profound social and political consequences. The Congress has by its enactment of voting right laws constrained the political process and given the courts a role--to the extent of those constraints. We have no warrant to impose our vision of "proper" restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act. The Supreme Court put it succinctly in *Growe*, stating that, where there has been no showing establishing the "three *Gingles* prerequisites," then under section 2 of the voting Rights Act "there neither has been a wrong nor can be a remedy."[30] A month later, the Court stated even more directly that, "[o]f course, the federal courts may not order creation of majority-minority districts unless necessary to remedy a violation of federal law."[31]

In sum, these arguments so ably presented by Morris Overstreet, African-American attorney and former state official and candidate for elective office, and others are directed to the wrong forum, however much we may personally admire the arguments. It bears mention that our plan has hardly left a bleak terrain. In District 25 of our plan, the combined African-American and Latino voting age population increased to a 52.3 majority. In the practical world, this percentage will dominate the Democratic primary in a district that has consistently elected a Democratic congressman. This is, then, in a real sense, a minority district produced by our process that enhances the elective prospects of a minority, albeit not wholly the district sought.

---

left to those elected to make such decisions.").

30. 507 U.S., at 41.

31. *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

As for the proposed Latino opportunity districts, the evidence shows that the Latino population is not sufficiently compact or numerous to support another, effective majority Latino citizenship district in Texas, in Dallas County or in South Texas.[32] We find that, under the totality of the circumstances, the failure to create seven such districts will not prevent full and equal Latino participation in the political process. It bears mention that our insistence upon compactness has increased the Latino force in District 24, a result supported by Congresswoman Eddie Bernice Johnson in her testimony at trial.

The Valdez-Cox plaintiffs also urge that Webb and Hidalgo Counties be left whole. We heard powerful arguments from the witness stand and counsel in opposition to a splitting of Hidalgo County in South Texas, and our neutral standards stood against such a county split. That standard was ultimately overriden as to Hidalgo County by the mandate of population equality under the principle of one-man, one-vote, and the existence of surrounding protected majority-minority districts. It is an ugly fact that the law's insistence on absolute population equality in court-drawn plans has to perverse effect of splitting counties and cities, when a tolerance of greater deviation would not demand such undesirable divisions. . The split here of Hidalgo County is a fit example.[33] Webb County was not caught in this squeeze and remains wholly intact in District 23.

VI

There being no reason for delay, we direct entry of final judgment in this case pursuant to Federal Rule of Civil Procedure 54(b).

---

32. *See Growe*, 507 U.S., at 39-40; *Gingles*, 478 U.S., at 50-51; *NAACP v. Fordice*, 252 F.3d 361, 365-67 (5th Cir. 2001).

33. We endeavored to and did respect the municipal boundaries of McAllen, a major population center of Hidalgo County.

So **ordered** and **signed** this 14th day of November, 2001.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE